JD(SF)–10–12
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
D/B/A WINDSOR CONVALESCENT CENTER
OF NORTH LONG BEACH,
Respondent

and Case: 21-CA-39703

SEIU, UNITED LONG TERM CARE WORKERS,
LOCAL 6434
Charging Party

*Cecelia Valentine, Esq.,* for the General Counsel.
*MJ Asensio & Ellen J. Shadur, Esqs.*
for the Respondent.
*Eileen B. Goldsmith, Esq*., for the Charging Party.

DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Los Angeles, California, on December 20–22, 2011, upon the Acting General Counsel's complaint, as amended,[1] that alleged that S & F Market Street Healthcare LLC, a California limited liability company, d/b/a Windsor Convalescent Center of North Long Beach (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith with SEIU, United Long Term Care Workers, Local 6434[2] (the Union) by engaging in a course of conduct designed to avoid its obligation to bargain in good faith and enter into a collective-bargaining agreement. Among the conduct alleged as demonstrating Respondent's lack of good faith is: unyieldingly adhering to restrictive contract proposals; insisting on an unlawful grievance-arbitration clause, restricting employees' rights to pursue State and Federal employment claims; insisting on a broad no-strike/no-lockout provision; insisting on a broad management-rights provision; failing to make any economic proposal or counterproposal; failing to consider a union-security clause; insisting on a broad discipline and discharge provision; insisting on retaining the sole and exclusive right to unilaterally subcontract unit work; insisting on retaining the sole and exclusive

[1] On November 22, 2011, the Acting Regional Director for Region 21 issued an amendment to complaint withdrawing par. 6(a) and amending the appropriate unit to include only the base unit of non LVN's. Paragraphs 6 and 7 were amended to conform to only the base unit being litigated.

[2] Formerly known as SEIU, Local 434-B.

right to unilaterally change employee benefits; and failing to respond to the Union's proposals and counterproposals. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

## Findings of Fact

### I. JURISDICTION

Respondent, a California limited liability corporation, with an office and place of business in Long Beach, California (Respondent's facility), has been engaged in the operation of skilled nursing facilities. During the past 12 months, Respondent in conducting its business operations derived gross revenues in excess of $100,000 and purchased and received goods at its facility valued in excess of $5000 which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Facts*

##### 1. The Respondent's facility

Respondent operates 34 facilities, including skilled nursing facilities, SNF, in the State of California. Employees at 13 of those facilities are represented by SEIU locals and 11 of the 13 facilities have collective-bargaining agreements. Respondent derives 70 percent of its revenues from Medi-Cal reimbursement for patient care it provides at its facilities. The instant SNF facility is a 124 bed care facility in Long Beach, California, the North Long Beach facility. Prior to July 1, 2004, Covenant Care Orange, Inc. (Covenant) operated the North Long Beach facility under the name Candlewood Care Center (Candlewood). The Union represented employees at the North Long Beach facility for many years and had entered into two collective-bargaining agreements, the most recent[3] of which expired in 2003. One contract covered nurses aides, CNAs, restorative aides, orderlies, dietary employees, activity assistants, and housekeeping employees (the Base unit involved herein), and the other covered licensed vocational nurses (the LVN unit).

##### 2. Prior unfair labor practices

On September 30, 2007, the Board in *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), *Windsor I,* found that as of July 1, 2004, Respondent, as a perfectly clear successor employer, violated Section 8(a)(1), (3), and (5) of the Act by, inter alia, refusing to recognize and bargain with the Union. In *S & F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354, (D.C. Cir. 2009), the United States Court of Appeals for the District of Columbia Circuit, affirmed in part the Board's decision in *Windsor I*, including the finding that Respondent was a successor employer to Covenant.

While the parties bargained for a short period of time in 2006, pursuant to a 10(j) order, there were no agreements reached and there was no further substantive bargaining until after the court of appeals decision in June 2009.

[3] R. Exh. 42.

On October 30, 2009, the Union filed a charge in Case 21-CA-39077, alleging that Respondent told reinstated employees Sharie Hailey and Edna Coulter that the facility was not a union facility and that they were the only employees who supported the Union, and issued an overly broad policy that limited the ability of bargaining unit employees to speak with union agents in nonworking areas of the facility during their nonworking time. The Union filed a second charge in Case 21-CA-39135 on November 24, 2009, alleging that a supervisor interrogated bargaining unit employees and made disparaging and undermining comments about the Union to them. These allegations were settled by a settlement stipulation[4] on December 30, 2010. In the stipulation Respondent did not admit it had committed any unfair labor practices.

3. The Alliance to Advance the Future of Nursing Home Care in California

In order to understand the parties' positions on many of Respondent's proposals, it is important to understand the history of both the Union's and various employer's efforts to assist employers in the nursing home industry to gain increased reimbursement rates from the State of California's Medi-Cal program.

Sometime before 2004 SEIU, its affiliates, ULTCW, UHW and Local 2028, and 18 California nursing home employers[5] who operated SNFs, similar to Respondent's facilities, in the State of California formed The Alliance to Advance the Future of Nursing Home Care in California, the Alliance. The Alliance's efforts culminated in the passage of California Assembly Bill 1629 in 2004 which increased reimbursement rates for SNFs. Under AB 1629 an interim reimbursement rate is published for each facility on August 1 for the fiscal year beginning that date. Final rates are published later in the year. For 2011 the final rates were issued between November 2010 and January 2011 and published in December 2011. Respondent's reimbursement rates have increased every year since 2008. Since rates are calculated on a cost plus basis that are predicated on the prior year's expenditures, it is fairly easy to calculate current costs.

In the period 2005-2006, the Alliance also agreed to create a "template" collective-bargaining agreement[6] which provided the framework for first time contracts between the union and employer members for first time contracts at facilities that agreed to card check. The terms of the template were favorable to both the union and employer members of the Alliance. The members of the Alliance agreed that employer members who signed a neutrality agreement, providing that some of their nonunion facilities could be organized based on a card check, could have the "template agreement" applied to employees at their facilities. There were no "template agreements" signed after 2008 and the Alliance cease to exist in 2008. Respondent was never a member of the Alliance and never agreed to sign a neutrality agreement. Respondent learned of the Alliance in 2005 and attempted to become a member.[7]

[4] GC Exh. 2(c).

[5] R. Exh. 53, pp. 17-18.

[6] R. Exh. 53, pp. 54-71.

[7] While Respondent contends that the Union blocked its attempt to join the Alliance this testimony was based on uncorroborated hearsay and will be given little weight.

4. The most recent bargaining

a. November 6, 2009

After the court of appeals issued its decision, the parties resumed bargaining on November 6, 2009. During the course of bargaining the chief representative for Respondent has been Joshua Sable, S & F Management Company general counsel. Chief spokesman for the Union since December 22, 2009, has been Jimmy Valentine, the Union's in house counsel. Prior to December 22, Corinne Eldridge, director of ULTCW's nursing home division was the Union's chief spokesperson. The facts herein are essentially not in dispute.[8] What follows is a chronological history of the parties' bargaining sessions.

At the November 6, 2009 meeting the Union presented Respondent with its proposals[9] gleaned largely from a collective-bargaining agreement Respondent had entered into at one of its 34 California facilities with a sister local of the Union in Northern California. The parties agreed that they would resolve noneconomic issues before bargaining over economic issues. The Union initially proposed bargaining in both the base unit and the LVN unit jointly. However, after Respondent objected to this procedure, the parties agreed to bargain separately in the two units. No agreements were reached in this session.

b. December 11, 2009

It is unclear whether the December 11, 2009, bargaining session was for the base unit or the LVN unit. However, the parties spent most of this session discussing the Union's union-security language which was identical for both units. Sable asked questions about the amount of union dues, and while Eldridge answered some of his questions, she took the position that this was an internal union matter. No agreements were reached at this meeting.

c. December 22, 2009

The next meeting took place on December 22, 2009. The Union submitted a revised proposal[10] to Respondent. Bargaining consisted of mainly discussions of union membership provisions. Valentine revised the Union's grievance-arbitration language to provide different tracks for severity of discipline.[11] Valentine also shortened the time for filing a grievance.[12] The Union provided new successorship language.[13] However, Sable refused to consider this proposal on the ground that no one would buy Respondent with such a provision.

d. February 10, 23 and March 5, 2010

The parties met again on February 10, 2010, at which time Respondent presented its first proposal.[14] The parties discussed Respondent's initial proposal on February 10 and 23 and March 5, 2010.

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[8] The parties at GC Exh. 2, entered into a stipulation of facts which sets forth most of the germane facts and documents involved in this case.

[9] GC Exh. 2(d), 3.

[10] GC Exh. 2(e).

[11] Ibid pp. 15-17

[12] Ibid.

[13] Ibid. p. 32 sec. 40.

[14] GC Exh 2(f).

Valentine raised questions about Respondent's dues-checkoff provision[15] which provided for monthly dues payment but no information about which employees paid their monthly dues. Valentine stated that the Union needed a monthly reconciliation and Sable responded that that would be too costly to Respondent. Valentine noted that Respondent's checkoff provision did not give the Union all of the information it needed; Sable raised concerns about employee identity theft and privacy and said that employees should have to give their consent for this information to be disclosed to the Union. Respondent proposed a maintenance-of-membership provision[16] that did not require employees to join the Union or pay an agency fee:

> Maintenance of Membership:
>
> *The Employer agrees that any employee who is currently a Union member, or who hereafter joins the Union, shall, as a condition of employment, be required to pay such Union dues and initiation fees the Union shall assess on the 31st day following the actual beginning of work pursuant to such employment*, (emphasis added) the effective date of this Agreement or its execution date, whichever is later, except that any employee may resign from the Union during the first ten (10) days of any month, by written resignation sent to the Union office, with a copy to the Employer. Upon such resignation, the employee shall have no further obligation to pay Union dues or initiation fees or to be a member of the Union as a condition of employment. The Employer shall not interfere with the rights of employees to choose to be members of the Union.
>
> During the term of this Agreement and any renewal thereof, the Employer shall deduct the regular monthly dues from the pay of member-employees as established in the preceding paragraph from whom the Employer has received or hereafter receives a written assignment, authorizing such deductions, which authorization shall be in the form annexed hereto as Exhibit "e" [TO BE PROVIDED BY THE UNION] The Employer agrees it will present a copy of the above dues deduction authorization form to newly hired employees at the time of their employment. In the event the employee does not elect to execute the authorization form at that time, the Union will be so notified in writing by the Employer. The Employer will remit once each month such deductions to the Union within thirty (30) calendar days from the date on which said deductions are made.

During these bargaining sessions Sable stated that employees should be able to resign from the Union since this would improve the retention of employees who hadn't paid dues in some time.

Valentine was also concerned about Respondent's discharge and discipline proposal:[17]

> Discipline and Discharge:
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> The Employer shall have the right to discipline (including suspension and termination) employees provided discipline is for cause. *Cause for immediate termination shall include, but not be limited to:* [emphasis added]

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[15] Ibid. p. 9.
[16] Ibid p. 8
[17] Ibid. pp. 10-12.

Patient/resident abuse

Leaving assigned work or leaving early without permission

Loitering, loafing or sleeping during working hours

Dishonesty

Gambling

Recklessness, incompetence or carelessness

Violating safety rules or policies

Violating health rules or policies

Violating security rules or policies

Violating other established Employer policies, rules or procedures

Insubordination or other failure to follow directions or disrespect of a supervisor or member of management

The use of abusive or threatening language toward a supervisor or member of management

Discourtesy to a resident, family member, medical facility employee, supervisor, or fellow-employee

Being under the influence of any drug, intoxicant or alcohol during the workday (including any break time)

Possession and/or use of alcohol, intoxicants or drugs on or off the premises during the work day (including any break time)

Conviction of an "OWI" or "DUI" offense

Possession of a gun, firearm, deadly instrument or weapon during the workday (including any break time) on or off the premises

Unlawful discrimination or harassment against any fellow employee, resident, family member or guest

Threatening others with physical harm

Provoking a fight or fighting during working hours or on company property

Participating in horseplay on company time or on company premises

Participating in practical jokes on company time or on company premises

Roughhousing on company time or on company premises

Willful or negligent destruction of Employer property, the property of any employee, or the property of any resident

Theft of Employer property, the property of any employee or the property of any resident

Removing or borrowing Employer, employee or resident property without prior authorization

Recording the work of another employee

Asking or allowing any other employee to punch one's time card

Falsification of any timecard, either the employee's or another employee's

Excessive absenteeism

Falsifying Employer records or documents such as a time card or report

Disloyalty to the Employer

Misappropriation of Employer, resident or other confidential information

Soliciting or accepting gifts, tips or gratuities of any kind

Immoral or indecent conduct (including vulgarity in mannerism or speech)

Unauthorized use of company equipment, time, materials or facilities

Engaging in criminal conduct, whether or not related to job performance

Causing, creating or participating in a disruption of any kind during working hours or on company property

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Failure to notify a supervisor when unable to report to work
Failure to observe working schedules, including rest and lunch periods

Failure to provide a physician's certificate when requested or required to do so

Making or accepting personal telephone calls during working hours, except in cases of emergency or extreme circumstances

Working overtime without authorization or refusing to work assigned overtime

Wearing extreme, unprofessional or inappropriate styles of dress or hair while working

Committing a fraudulent act or breach of trust under any circumstances

Soliciting or distributing literature of any kind or of any sort on the premises

Conducting personal business during working hours, or conducting personal business on company premises during non-working hours

> Littering the premises of the Employer, including neighbors' property and adjacent sidewalks and streets
>
> Entering the facility of the Employer or remaining on the premises while not on duty or scheduled for work
>
> Falsely stating or making claims of injury
>
> Posting any notices on the premises without authorization
>
> Any behavior that interferes with the residents' rights or dignity
>
> Failure to have or maintain current licensing or certifications as required by the Employer or by law
>
> Any conduct that results in the facility being issued a citation
>
> *Any other similarly severe circumstances constituting cause for immediate termination including but not limited to such conduct prohibited by the Employer's rules of conduct or Employee Handbook.*
>
> *The Employer shall have the right to establish from time to time rules of conduct, not inconsistent with the terms of the Agreement and to discipline employees who violate same.* [Emphasis added.]

This provision included 53 separate offenses that provided cause for discipline. The provision also allowed Respondent to unilaterally add offenses and it limited an arbitrator's ability to determine if the discipline was for cause. When Valentine noted that a gambling offense could run the gamut from participating in an NCAA final four basketball pool to gambling in a patient's room, Sable said such distinctions were not relevant.

Respondent's grievance and arbitration proposal[18] restricted employees from filing both Federal and State statutory claims, including claims arising under the National Labor Relations Act (NLRA):

> Grievance and Arbitration Procedure:
>
> *Any disputes between the Employer and the Union or any member of the bargaining unit, and any and all claims regarding equal employment opportunity provided for under this Agreement or any federal, state or local law against discrimination or fair employment practice law, shall be exclusively addressed by an individual employee or the Union under the Grievance and Arbitration provision of this Agreement.* [Emphasis added.]
>
> The term "grievance" shall mean any dispute between the Employer and the Union or between the Employer and employee concerning the meaning, interpretation, or application of any provisions of this Agreement, or a condition of employment, or a claim

[18] Ibid. pp. 26-27.

of breach or violation of any provisions of this Agreement. B*oth parties specifically agree to arbitrate statutory claims, including, but to limited to, the California Fair Employment and Housing Act; California Family Rights Act; Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., 42 U.S.C. §§1981, 1983 and 1985, the American with Disabilities Act, 42 U.S.C. §1201 et. seq., E.R.I.S.A., 29 U.S.C. §1001 et. seq., the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 et. seq., and the National Labor Relations Act, 29 U.S.C. §151 et. seq.* [Emphasis added.] These disputes or claims shall be settled by the following procedure:

STEP 1: The employee and/or the steward shall make a reasonable attempt to adjust the difference with the employee's immediate supervisor or the Administrator within two (2) calendar days of the incident causing the grievance.

STEP 2: If no settlement is reached in Step 1, the grievance shall be reduced to writing presented to the Administrator within four (4) calendar days of the incident causing the grievance. Within fourteen (14) calendar days following the receipt of the written grievance, a meeting shall be held by an Employer representative and the Union to attempt to settle the grievance. A decision will be rendered to the Union within seven (7) calendar days from the meeting date. All grievances, with the exception of those involving terminations, will be deemed resolved upon completion of Step 2 of this Grievance and Arbitration procedure. *Only grievances involving termination of employment can be arbitrated and proceed to Step 3.* [Emphasis added.])

The language also provided that unless grievances were filed within 4 days they were waived. This was particularly relevant to CNA employees, the majority of Respondent's work force, who work 4 days on 2 days off.

The Union objected to Respondent's no-strike/no-lockout proposal[19] as too broad, possibly making the Union responsible for a subcontractor or nonunit employee and making a bargaining unit employee subject to termination for using the word "strike:"

No Strike or Lockout:

Both the Employer and the Union recognize the service nature of the mission of the facility and the long-term care industry and the duty of the Employer to render continuous and hospitable healthcare and resident services and other amenities and accommodations to residents and hospitable service to the public in general.

The Union agrees that it will not call, engage in or sanction any strike, sympathy strike, boycott, picketing, work stoppage or slow down, sit-down, sit-in, walkout, sick-out, or other retarding of work, refusal to handle merchandise, or other economic interference, pressure or activity of any kind or nature. *This shall include dealings by the Employer with non-union suppliers, deliverymen, organizations, or other employees not covered by this Agreement. A threat to commit any of the above acts shall be considered a violation of this Article.* (emphasis added)

The Union agrees that it will take immediate action to end any unauthorized strike, work stoppage, slow down, sympathy strikes, sick-out, picketing, concerted refusal to work overtime, or other concerted interference with the Employer's operations and will make

[19] Ibid. p. 35.

all reasonable efforts to induce employees to return to work and discontinue said activities.

*The Employer shall have the option of immediately discharging any employee engaging in any conduct prohibited by this Article, and such discipline shall not be subject to the arbitration provisions set forth in this Agreement.* [Emphasis added.]

In consideration of the Union's commitment as set forth in this section of this Agreement, the Employer shall not lock out employees. The Employer shall have the right to maintain an action for damages resulting from the Union's violation of this Article. Any claim by the Employer for damages resulting from any violation of this Article shall not be subject to the grievance and arbitration provision of this Agreement. *While disciplinary action taken against employees for violating this Article or any other provision of this Agreement is subject to the grievance clause hereof, the Employer is entitled to seek injunctive relief against any strike in violation of this Article pending the decision of an arbitrator. Grievance over disciplinary action taken against employees found to have violated this Article shall be limited to the issue of whether or not the employee in question actually engaged in prohibited activity. If the Employer determines that an employee engaged in an activity prohibited under this Article, any disciplinary measures taken by the Employer against the employee must be left unmitigated.* [Emphasis added.]

In the event of an alleged violation of this section of this Agreement arising out of a matter not subject to resolution pursuant to the grievance and arbitration procedures set forth in this Agreement, the Employer may institute expedited arbitration proceedings regarding such alleged violation by delivering written or telegraphic notice thereof to the Union and to the FMCS. Immediately upon receipt of such written or telegraphic notice, FMCS shall appoint an arbitrator to hear the matter. The arbitrator shall determine the time and place of the hearing, give telegraphic notice thereof, and hold the hearing within twenty-four (24) hours after his appointment. The fee and other expense of the arbitrator in connection with this expedited arbitration proceeding shall be shared equally by the Employer and the Union. The failure of either party or any witness to attend the hearing as scheduled and noticed by the arbitrator, shall not delay the hearing, and the arbitrator shall proceed to take evidence and issue an award and order as though such party or witness were present. The sole issue at the hearing shall be whether a violation of this section has occurred or is occurring, and the arbitrator shall not consider any matter justifying, explaining or mitigating such violation. If the arbitrator finds that a violation of this section of this Agreement is occurring or has occurred, he shall issue a cease or desist order with respect to such violation. The arbitrator's written opinion, award and order shall be issued within twenty-four (24) hours after the close of the hearing. Such award and order shall be final and binding on the Employer and the Union. In addition, in the event of an alleged violated of this section of this Agreement, the Employer may immediately apply to the United States District Court for the Central District of California for injunctive relief, including a temporary restraining order, prohibiting the continuation of such an alleged violation pending submission of the matter to arbitration and the issuance and enforcement of the arbitrator's order.

In addition to any other remedy set forth in this section, the Employer, without submitting the issue of damages to arbitration, may institute, in any court of competent jurisdiction, an action against the Union for damages suffered by the Employer as a result of a violation of this section. The remedies set forth in this Article are not exclusive, and the Employer may pursue whatever remedies are available to it at law or equity.

Respondent's management-rights proposal [20] gave Respondent the unilateral right to have managers perform unit work and to subcontract unit work:

> Management Rights:
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> Except to the extent abridged, delegated, granted or modified by a provision of this Agreement, the Employer reserves and retains the responsibility and authority that the Employer had prior to the signing of this Agreement, and these responsibilities and authority shall remain with management. It is agreed that the Employer has the sole and exclusive right and authority to determine and direct the policies and methods of operating the business, subject to this Agreement. Without limiting the foregoing, the responsibilities and authority of management include the right to:
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> 1. Manage, direct and control its property and workforce;
> 2. To conduct its business and manage its business affairs;
> 3. To direct its employees;
> 4. To hire;
> 5. To assign work;
> 6. To transfer;
> 7. To promote;
> 8. To demote;
> 9. To layoff;
> 10. To recall;
> 11. To evaluate performance;
> 12. To determine qualifications;
> 13. To discipline;
> 14. To discharge;
> 15. *To unilaterally adopt and enforce reasonable rules and regulations;*
> 16. *To establish and to effectuate policies and procedures including but not limited to a drug\alcohol testing policy and an attendance\tardiness control policy*; [emphasis added]
> 17. To establish and enforce dress codes;
> 18. To set standards of performance;
> 19. To determine the number of employees, the duties to be performed, and the hours and locations of work, including overtime;
> 20. <u>To determine, establish, promulgate, amend and enforce personal conduct rules, safety rules and work rules;</u> (emphasis added)
> 21. To determine the number of employees assigned to any shift, operation or job;
> 22. To determine if and when positions will be filled;
> 23. To establish, change or abolish positions;
> 24. To discontinue any function;
> 25. To create any new service or function;
> 26. To discontinue or reorganize or combine any department or branch of operations with any consequent reduction or other changes in the work force;
> 27. To make any technological changes;
> 28. To install or *remove* any equipment, regardless of whether any of the foregoing or any other such actions cause reductions or transfers in the workforce, or whether such action requires an assignment of additional, fewer, or different duties, or causes the elimination or addition of positions;

[20] Ibid. pp. 40-42.

29. *To either temporarily or permanently close all or any portion of its facility and/or to relocate such facility or operation;* [emphasis added]
30. To determine and schedule when *overtime* shall be worked;
31. To determine the number of employees required to staff the facility, including increasing or decreasing that number;
32. To determine the length of the shift of employees, including the ability to increase or reduce that number;
33. To determine the appropriate staffing levels required at the facility;
34. To determine the start and end times of shifts; and,
35. Determine the appropriate mix of employees, by job title, to operate the facility.

The Employer's failure to exercise any function or responsibility hereby reserved to it, or its exercising any function or right in a particular way, shall not be deemed a waiver of its responsibility to exercise such function or responsibility, nor preclude the Employer from exercising the same in some way not in conflict with this Agreement.

*The Employer's Rules and Regulations as set forth in the Employee Handbook shall apply to all Union employees. These Rules and Regulations are attached as Appendix "8" to this Agreement, and, are subject to change at the sole discretion of the Employer.* [Emphasis added.]

Employees shall work as directed by supervisory personnel. Employees may perform duties outside of their classification or normal work assignment without restriction. Under all circumstances, the Employer reserves the right to establish the number of employees and the work methods necessary to perform any activity. Supervisory personnel shall not be prohibited or restricted from performing any work in the facility in any way. The Union understands and agrees that certain employees, outside of the bargaining unit, have duties and responsibilities which require them to work with employees covered by the Agreement and perform work which employees covered by this Agreement may also perform. Further, the Union understands and agrees that in order to assure effective, efficient and expeditious service to the Employer's residents, family members and guests, any/or all of the Employer's employees may be used to perform services covered hereunder when, in the Employer's opinion, the efficient operation of the facility mandates their assignment to perform such services.

*The Employer retains the sole and exclusive right to contract or subcontract out work covered wider this Agreement to subcontractors or other services providers who are not bargaining unit members. In addition, without limiting the foregoing, the Employer shall have and retain the right in its sole discretion and judgment to contract out any special work or special projects that are not normally, routinely,*
*and regularly' performed by bargaining unit employees as part of their regular duties.* [Emphasis added.]

A discreet contract provision[21] also gave Respondent unfettered right to subcontract unit work:

Subcontracting:

[21] GC Exh. 2(f) p. 55.

> The Employer retains the sale and absolute right and discretion to subcontract any and all work performed at the facility.

When Valentine objected to the Respondent's unfettered ability to subcontract unit work, Sable said the employer should be able to run its facility as it sees fit.

The parties did not reach any agreements on neither February 10, 23 nor March 5, 2010.

e. April 6, 20, 23, 2010

On April 6, 2010, the parties met and the Union presented further proposals,[22] including a revised discipline and discharge clause giving the Respondent the right to discharge for just cause. However, Sable made no movement from his original proposal. The Union also offered a shorter time for filing grievances.[23] Respondent reduced its proposed term of the contract from 48 to 36 months.

On April 20, 23, 2010, the parties again met. There were TA's on offer, prefatory statement, preamble, severability, probationary employees, and jury duty language.

f. June 4, 2010

June 4, 2010 parties met and Respondent submitted its revised proposals.[24] Respondent continued to adhere to its maintenance of membership language, requiring only those employees who chose to become union members to pay dues without provision for payment of an agency fee.[25] In this regard Sable contended that employees should have the right to choose to pay dues since they didn't vote for the Union.

Respondent's dues-checkoff provision required the Union to pay $50/month for a monthly reconciliation of dues report. At hearing Sable testified that he never checked to see if Respondent's other organized facilities provided a reconciliation list nor whether this function could be automated. Respondent proposed an additional day for employees to file a grievance. In addition Respondent proposed new language to the discipline and discharge provision:[26]

> Nothing in this Section is in any way intended to limit or restrict the arbitrator in the event of a grievance involving a suspension of ten (10) days or more or a termination from concluding that the misconduct alleged by the Employer did not in fact occur or that mitigating factors existed. *However, the parties agree that violations of the aforementioned standards will establish cause sufficient to support termination of employment or any other disciplinary action selected by the Employer.* [Emphasis added.].

Coupled with this proposal Respondent expanded the use of the good-faith standard in its June 4, 2010 grievance and arbitration proposal.[27]

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[22] GC Exh. 2(g).
[23] Ibid. p. 15 sec. 15(e)(1) and sec. 17(f)(1).
[24] GC Exh. 2(h).
[25] Ibid. p. 8.
[26] Ibid pp. 12-13
[27] Ibid p. 29

> In all arbitrations involving terminations, the arbitrator shall be permitted to order reinstatement but may not award any back pay or monetary penalties if he/she finds that the Employer in good faith concluded that misconduct had occurred. There is no requirement on the Employer to actually prove that the misconduct actually occurred. Among the items to be considered by the arbitrator in determining whether the Employer acted in good faith is whether or not it conducted an adequate investigation, including the opportunity for the employee charged with misconduct to respond or otherwise dispute the validity of the charges.

No other changes were made in Respondent's proposals on arbitration, no strike/no lockout, management rights and subcontracting. Respondent proposed expanding the "good-faith standard" in the arbitration clause to include all discipline.[28] Respondent also proposed that if employees refuse to sign a disciplinary record they could be terminated.[29]

The parties reached tentative agreements on 12 subjects[30] by June 4, few of which were substantive: prefatory statement, offer, preamble, recognition, probationary period, jury duty, workload distribution, job descriptions, safety, training, savings clause, and tuition reimbursement.

g. June 23 and October 19, 2010

After almost 8 months of bargaining with virtually no substantive progress on non economic issues, on June 23, 2010 the parties conferred and the Union submitted an economic proposal and summary of negotiations.[31] While not in formal contract language, the Union's economic talking points were certainly the substance of economic proposals by any other name.

On October 19, 2010 the parties met and the Union made revised economic proposal.[32] Sable responded that he could make no economic counter because the State of California had not announced Respondent's reimbursement rate. Valentine claimed the interim reimbursement rate was announced August 1, 2010 with a final rate on January 1, 2011.

h. November 17, 2010

On November 17, 2010, the parties met and Respondent presented revised proposals.[33] The Union presented a summary of negotiations.[34] There were no changes to Respondent's discipline and discharge, grievance-arbitration, no strike-no lockout, management- rights, subcontracting, or maintenance of membership language. Respondent's first economic proposals included paid vacation, holidays, sick leave, health and dental insurance, 401(k), and bereavement leave. Each of its proposals provided that Respondent could unilaterally change or delete any benefit:

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[28] Ibid. p. 29.
[29] Ibid. p. 35.
[30] GC Exh. 2(h)
[31] GC Exh. 2(i) and (j).
[32] GC Exh. 2(k).
[33] GC Exh. 2(l), pp. 20-25.
[34] GC Exh. 2(m).

Paid Vacation:

The amount of vacation pay that full-time employees accrue and the conditions under which it may be taken shall be set forth and governed by the Employee Handbook or such other written materials the Employer may generate on this subject. *The Employer retains the sole and exclusive right to modify or eliminate the amount of vacation full-time employees accrue and/or the conditions governing its use at any time, for any reason, upon providing written notice to the Union. There shall be no obligation on the part of the Employer to bargain over such changes to its vacation policy or the elimination of its vacation policy.* [Emphasis added.]

Paid Holidays:

The number and identity of the paid holidays to be offered by the Employer and the conditions under which holiday pay will be provided shall be set forth and governed by the Employee Handbook or such other written materials the Employer may generate on this subject. *The Employer retains the sole and exclusive right to modify or eliminate paid holidays and the conditions under which holiday pay will be provided, at any time, for any reason, upon providing written notice to the Union. There shall be no obligation on the part of the Employer to bargain over such changes to its paid holiday policy or the elimination of its paid holiday policy.* [Emphasis added.]

Health and Dental Insurance:

The Employer's contribution to health insurance premiums shall be set forth and governed by the Employee Handbook or such other written materials the Employer may generate on this subject. The Employer retains the sole and *exclusive right to modify or eliminate its contributions to health insurance premiums at any time, for any reason, upon providing written notice to the Union. There shall be no obligation on the part of the Employer to bargain over changes to or the elimination of its contribution to health insurance premiums*. [Emphasis added.]

Paid Sick Leave:

The amount of sick leave that full-time employees accrue and the conditions under which it may be taken shall be set forth and governed by the Employee Handbook or such other written materials the Employer may generate on this subject. *The Employer retains the sole and exclusive right to modify or eliminate the accrual of sick leave and the policies governing its use at any time, for any reason, upon providing written notice to the Union. There shall be no obligation on the part of the Employer to bargain over such changes to its accrual of sick leave or sick leave policy or the elimination of its sick leave accrual or sick leave.* [Emphasis added.]

Bereavement Leave:

The amount of bereavement leave and the conditions under which it may be taken shall be set forth and governed by the Employee Handbook or such other written materials the Employer may generate on this subject. *The Employer retains the sole and exclusive right to modify or eliminate its bereavement leave , policies at any time, for any reason, upon providing written notice to the Union. There shall be no obligation on the part of*

*the Employer to bargain over such changes to its bereavement policy or the elimination of its bereavement policy.* [Emphasis added.]

Retirement:

The Employer will offer a 401 k plan for bargaining unit employees to participate in. Participation in the 401 k plan will be pursuant to the provisions of the Employee Handbook or such other literature as may be generated and distributed by the Employer on this subject. *The Employer retains the sole and absolute discretion to modify the terms of participation in the 401 k plan or to eliminate it at any time upon notice to the Union. There is no obligation on the part of the employer to bargain over changes to the 401(k) plan or elimination of the 401(k) plan.* [Emphasis added.]

i. The January 24 and February 7, 2011 session with the mediator

On January 24, 2011, the parties met with an FMCS mediator and the Union presented a summary of negotiations and the parties' positions.[35] Valentine listed concessions the Union was willing to make to reach agreement. The concessions included quarterly dues reimbursement list at no charge to Respondent, an agreement to Respondent's management-rights clause in full if Respondent agreed to some restrictions on subcontracting, agreement to the long list of infractions included in Respondent's discipline and discharge language if it was agreed these could lead to discipline rather than being just cause for discipline and agreement to a successorship clause that provided the successor did not have to maintain the terms and conditions of the collective-bargaining agreement but only that Respondent would provide employees notice of a proposed sale. No tentative agreements were reached.

On February 7, 2011, the parties met with an FMCS mediator without any progress.

On February 23, 2011 the instant unfair labor practice charges were filed.

j. Respondent's March 3, 2011 proposal

March 3, 2011 Respondent presented a revised proposal.[36] Respondent deleted the $50 requirement for the Union to receive a monthly dues check off reconciliation.[37] Respondent also eliminated the right to unilaterally eliminate some economic benefits, including vacation, sick and bereavement pay but added a formula allowing Respondent to unilaterally modify those benefits if Medi-Cal reimbursement benefits fell below a certain level.[38] Respondent retained the right to unilaterally eliminate or change the 401(k) plan and Respondent continued to assert the right to unilaterally eliminate health benefits if Medi-Cal reimbursement benefits fell below a certain level:

vacations

In the event the Employer's Medi-Cal per diem rate reimbursement rate stays flat or goes down in any year this Agreement is in effect, the Employer reserves the right upon

[35] GC Exh. 2(n).
[36] GC Exh. 2(o).
[37] Ibid. p. 9.
[38] Ibid. pp. 20-26.

60 days written notice to the Union to Implement the following revised vacation 'accrual schedule:

holidays

In the event the Employer's Medi-Cal per diem rate reimbursement rates stays flat or goes down In any year this Agreement Is In effect the Employer reserves the right upon 60 days written notice to the Union to eliminate the Memorial Day holiday, Labor Day holiday or both.

Health and dental insurance

Full time employees shall be permitted to participate in the health plans sponsored by the Employer. *The Employer' retains the sole and exclusive right to determine the plan(s) which will be offered to bargaining unit employees. The Employer also retains the sole and exclusive right to change or modify the health plans offered to bargaining unit employees upon providing written notice to the Union. There shall be no obligation on the part of the Employer to bargain with the Union over any changes or modification of health plans offered to bargaining unit employees.* [Emphasis added.]

Sick leave

A fixed amount of sick leave was set forth.

Bereavement

A fixed amount of bereavement leave was established.

Retirement:

The Employer will offer a 401(k) plan for bargaining unit employees to, participate in. Participation in the *401(*k) plan will be pursuant to the provisions of the Employee' Handbook or such other literature as may be generated and distributed by the Employer on this subject. *The Employer retains the sole and absolute discretion to modify the terms of participation in the 401 (k) plan or to eliminate it at any time upon notice to the Union in the event the Employer's Medi-Cal per diem rate stays flat or decreases during the term of this Agreement.* [Emphasis added.]

Respondent's new grievance-arbitration language provided for 6 days to file a grievance but continued to waive an employee's right to file statutory claims. No changes were made to no strike-no lockout or the management-rights language. While the subcontracting clause now gave the Union 30 days notice of intent to subcontract Respondent still retained the unilateral right to subcontract unit work without any requirement that the subcontractor recognize the Union and apply the terms of the contract.

While the parties talked about conducting further bargaining sessions, no further bargaining has been scheduled. It is undisputed that neither party has refused to bargain or declared impasse.

*B. Discussion and Analysis*

In the complaint herein, it is alleged that Respondent engaged in various actions that demonstrate Respondent's lack of good faith in bargaining with the Union including unyieldingly adhering to restrictive contract proposals; insisting on an unlawful grievance-arbitration clause that restricts employees' rights to pursue State and Federal statutory employment claims; insisting on a broad no-strike/no lockout provision; insisting on a broad management-rights provision; failing to make any economic proposal or counterproposal; failing to consider a union-security clause; insisting on a broad discipline and discharge provision; insisting on retaining the sole and exclusive tight to unilaterally subcontract unit work; insisting on retaining to sole and exclusive right to unilaterally change employee benefits; and failing to respond to the Union's proposals and counterproposals.

1. The law regarding surface bargaining

Section 8(d) of the Act imposes on unions and employers the obligation:

> [T]o bargain collectively . . . in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

In interpreting the "good faith" standard in the course of collective bargaining, the Board will examine the totality of a party's conduct during bargaining, both at and away from the table, to determine if the negotiations have been used to frustrate or avoid mutual agreement, i.e. surface bargaining. *Regency Service Carts, Inc.*, 345 NLRB 671 (2005); *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB, 1600, 1603. (1984).

In *Regency Service Carts*, supra at 671, the Board has pointed to several factors that suggest surface bargaining violations:

> These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, supra at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

While the Board has admonished that it will look to the totality of circumstances surrounding bargaining to determine if there has been good faith or mere sham, it has also made clear that in the appropriate circumstances it may rely alone on the parties' bargaining proposals, not to determine their merit but to determine if they evince an intent to avoid their bargaining obligations. As Judge Anderson noted in *Public Service Co. of Oklahoma, supra at* 497:

To find a violation of Section 8(a)(5) of the Act, the totality of an employer's conduct must be such as to sustain the General Counsel's burden of proof that there was no required intent by that party to reach agreement. In such an analysis proposals must be considered "not to determine their intrinsic worth but instead to determine whether in combination and in the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative*, supra at 1127. *Coastal Electric Cooperative*, 311 NLRB 1126 (1993).

The Board later affirmed this principle in *Regency Service Carts,* supra at 675:

> An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract. Id. at 488 (citing, inter alia, *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984)). "In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith." Id.

See also *Public Service Co. of Oklahoma*, supra at 487-488 and *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). For as the Board stated in *Altorfer* at 149*:*

> Having said that, however, the Board is not prohibited altogether from scrutinizing the substance of bargaining proposals, though for a quite different purpose. That purpose is to ascertain whether bargaining is being conducted through the tactic of "sophisticated pretense in the form of apparent bargaining sometimes referred to as 'shadow boxing' or 'surface bargaining'," *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974), whereby a party goes through the motions of negotiating without, in fact, any intention of trying to reach agreement or, alternatively, with a "take it or leave it" attitude."
>
> "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to," NLRB v. Wright Motors, Inc., 603 F.2d 604, 609 (7th Cir. 1979), and "if the board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employers in the course of bargaining negotiations." *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887.
>
> "The reasonableness or unreasonableness of demands are among the factors which the fact finder can consider in the difficult task of laying bare the subjective intent of the parties." NLRB v. Arkansas Rice Growers Assn., 400 F.2d 565, 572 (8th Cir. 1968). Not to evaluate whether or not those proposals are sufficiently generous, but rather to reach determinations in two other areas.

Notwithstanding the clear language of *Public Service Co. of Oklahoma*, *Altorfer Machinery Co.*, and *Regency Service Carts, supra,* Respondent contends *Public Service Company of Oklahoma* is inapposite to the issues in this case. Respondent argues that *Public Service Co. of Oklahoma* is not a case in which the Board found that the employer's proposals alone supported a finding of unlawful surface bargaining. Respondent notes in its brief that while aspects of the administrative law judge (ALJ) opinion suggest that the ALJ reached such a conclusion, the Board's decision relied upon findings that the employer had engaged in some of the conduct described in *Atlanta Hilton & Tower.* Respondent takes the position that perhaps

more important, the employer in *Public Service Company of Oklahoma* had made its final proposals.

In addition Respondent suggests that a finding of surface bargaining cannot be predicated on the substance of an employer's proposals alone. In support of this proposition, Respondent cites a number of cases where the Board found surface bargaining based upon a combination of factors, including the employer's proposals. *South Carolina Baptist Ministries,* 310 NLRB 156, 156 (1993) *Western Summit Flexible Packaging,* 310 NLRB 45, 51-53 (1993) *Public Service Co. of Oklahoma, 334* NLRB at 488-490; *Overnite Transp. Co.,* 296 NLRB 669, 688-689 (1989); *A-J King Size Sandwiches,* 265 NLRB 850 (1982); *Borg-Warner Controls,* 198 NLRB 726 (1972).

In its contention that surface bargaining cannot be predicated on the substance of an employer's proposals alone, Respondent is raising red a herring. The Board has never said proposals alone are insufficient or that an employer must have made a final proposal in order to find surface bargaining. Indeed in *Public Service Co* at 490, contrary to Respondent's assertion, the Board concluded that Respondent had violated Section 8(a)(5) of the Act by virtue of its proposals that stripped the union of its representational role:

> The judge's finding that the Respondent sought to retain unilateral control over virtually every significant aspect of the employment relationship is fully supported by the record evidence. We accordingly find that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by insisting as a price for any collective-bargaining agreement that its employees give up their statutory rights to be properly represented by the Union. *NLRB v. Johnson Mfg. Co. of Lubbock,* supra, 458 F.2d at 455.

While other factors may be relevant in some cases that assist in finding surface bargaining, the plain language of the above-cited cases is that proposals alone in certain circumstances may be sufficient to establish lack of good faith.

An argument similar to Respondent's was made by the employer in *A-1 King Size Sandwiches, Inc.,* 265 NLRB 850, 858 (1982), and rejected by the Board. There judge Miller noted:

> As stated in its brief, "Respondent contends that the controlling law in this country is that in determining whether the conduct of an employer in bargaining constitutes bad faith, the Board and courts cannot, as a matter of law, rely exclusively on the language and content of contract proposals."

Judge Miller cited with the Board's approval in *NLRB v. Wright Motors, Inc.,* 603 F.2d 604, 609-610 (7th Cir. 1979), where the court stated:

> Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. *N.L.R.B. v. Holmes Tuttle Broadway Ford, Inc.,* 465 F.2d 717, 719 (9th Cir. 1972); *Vanderbilt Products Inc. v. N.L.R.B.,* 297 F.2d 833 (2d Cir. 1961); *N.L.R.B. v. Reed* d *Prince Manufacturing Co.,* 205 F.2d 131, 134-135, 139 (1st Cir. 1953), certiorari denied, 346 U.S. 887 . . . .The fact that it may be difficult to distinguish bad-faith bargaining from hard bargaining cannot excuse our obligation to do so.

2. Analysis of Respondent's proposals

In order to determine if Respondent engaged in surface bargaining, a close examination of Respondent's proposals and counterproposals must be made together with any statements made by Respondent's representatives and the totality of Respondent's conduct both at and away from the bargaining table. *Whitesell Corp.,* 357 NLRB No. 97, fn.1 (2011).

a. Grievance/arbitration

Respondent's initial grievance arbitration proposal of February 10, 2010[39] swept all disputes arising under the agreement within the grievance/arbitration procedure including: ". . . any and all claims regarding equal employment opportunity provided for under this Agreement or any federal, state or local law against discrimination or fair employment practice law,. . ." This provision specifically included:

> [T]he California Fair Employment and Housing Act; California Family Rights Act; Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., 42 U.S.C. §§1981, 1983 and 1985, the American with Disabilities Act, 42 U.S.C. §1201 et. seq., E.R.I.S.A., 29 U.S.C. §1001 et. seq., the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 et. seq., and the National Labor Relations Act, 29 U.S.C. §151 et. seq.

This provision effectively precluded the Union and bargaining unit members from filing statutory claims. More importantly, it vested Respondent with sole authority for determining the validity of all non termination grievances, including those under state and federal statutory provisions under grievance step two, since the only grievances subject to neutral arbitration were terminations.

Respondent admits that its proposal to require arbitration of all employment disputes might not have been legally tenable but contends that it is sheer speculation to argue that it would have held firm on this proposal had the Union continued to bargain. After 15 months of failure to change its fundamental position on arbitration language and with no indication at or away from the bargaining table that there was room to compromise, to the contrary, it is fairly predictable that Respondent had no intention of removing the language requiring employees to waive statutory remedies.

Respondent's proposals of June 4, 2010[40], November 17, 2010[41] and March 3, 2011[42], made no substantive changes to its grievance-arbitration proposal other than increasing the time for filing a written grievance from 4 to 7 days and adding 10-day suspensions to terminations as the only subjects that could be arbitrated.

Respondent contends that its grievance/arbitration proposal did not usurp the authority of the arbitrator, citing its June 4, 2010 amended discipline and discharge proposal:

> Nothing in this Section is in any way intended to limit or restrict the arbitrator in the event of a grievance involving a suspension of ten (10) days or more or a termination from

[39] GC Exh. 2(f) at pp. 26-27.
[40] GC Exh. 2(h) at pp. 28-30.
[41] GC Exh. 2(l) at pp. 27-29.
[42] GC Exh. 2(o) at pp. 28-30.

concluding that the misconduct alleged by the Employer did not in fact occur or that mitigating factors existed.

However, this sentence must be read together with the next sentence in Respondent's June 4 proposal: "However, the parties agree that violations of the aforementioned standards will establish cause sufficient to support termination of employment or any other disciplinary action selected by the Employer."

At the same time Respondent added new, good-faith language in its grievance/arbitration proposal:

> In all arbitrations involving terminations, the arbitrator shall be permitted to order reinstatement but may not award any back pay or monetary penalties if he/she finds that the Employer in good faith concluded that misconduct had occurred. There is no requirement on the Employer to actually prove that the misconduct actually occurred. Among the items to be considered by the arbitrator in determining whether the Employer acted in good faith is whether or not it conducted an adequate investigation, including the opportunity for the employee charged with misconduct to respond or otherwise dispute the validity of the charges

The discharge/discipline proposal together with its June 4, 2010 good- faith standard proposal effectively limited arbitral remedies for any discharged employee regardless of the reason for the discharge. Thus, in any case where the arbitrator found Respondent had acted in good faith in terminating an employee, regardless of any mitigating factors (such as, for example, whether the employee actually engaged in the conduct for which he or she was terminated, or whether Respondent correctly applied its rules or the collective-bargaining agreement), the arbitrator would be barred from providing a make-whole remedy.

Respondent's proposals as a whole clearly restricted the discretion of the arbitrator and eliminated any grievances of less than 10 days suspension. Further, the arbitration proposal, which forced employees to use the limited arbitration remedy for statutory claims, including the right to file unfair labor practices under the NLRA, left employees with fewer rights than if they had no collective- bargaining agreement.

b. No strike/no lockout and discharge/discipline

Respondent's grievance- arbitration language must be viewed together with its February 10, 2010 proposals for no strike/no lockout and discipline and discharge. The no strike no/lockout language was extremely broad. It prohibits not only any strike, sympathy strike, boycott, picketing, work stoppage or slow down, sit-down, sit-in, walkout, sick-out, or other retarding of work, refusal to handle merchandise, or other economic interference, pressure or activity of any kind or nature, but also any threat to commit any of the *above* acts. Any employee terminated pursuant to its terms is precluded from arbitration, thus effectively giving Respondent sole authority to determine the merits of any grievance arising from this provision under grievance step two.

The discipline/discharge language lists 53 separate activities that constitute "cause" for immediate discharge. In addition this provision adds any similar circumstances listed in Respondent's rules of conduct or employee handbook that it has the unilateral right to change under its management rights proposal. By establishing cause for each of these infractions, under the grievance/arbitration proposal, an arbitrator has only limited authority to overrule Respondent discipline.

c. Management rights

Respondent's February 10, 2010, management-rights proposal gave it unilateral authority to unilaterally adopt and enforce reasonable rules and regulations; to determine, establish, promulgate, amend and enforce personal conduct rules, safety rules and work rules; to establish, change or abolish positions; to discontinue any function; to install or *remove* any equipment, regardless of whether any of the foregoing or any other such actions cause reductions or transfers in the workforce, or whether such action requires an assignment of additional, fewer, or different duties, or causes the elimination or addition of positions; to either temporarily or permanently close all or any portion of its facility and/or to relocate such facility or operation; to establish and to effectuate policies and procedures including but not limited to a drug\alcohol testing policy and an attendance\tardiness control policy; to determine the number of employees required to staff the facility, including increasing or decreasing that number; to determine the length of the shift of employees, including the ability to increase or reduce that number; to determine the appropriate staffing levels required at the facility; to determine the start and end times of shifts; to apply the Employer's Rules and Regulations as set forth in the Employee Handbook to all Union employees; to change these Rules and Regulations . . . at the sole discretion of the Employer; to direct employees to perform duties outside of their classification or normal work assignment without restriction; to allow supervisory personnel to perform any work in the facility in any way.

As Respondent correctly points out there is no doubt that an employer has every right to insist on a broad management rights clause. *St. George's Warehouse, Inc.,* 341 NLRB 904, 906-907 (2004). However, Respondent's management-rights language cannot be viewed in isolation from its other proposals. It is not Respondent's insisting on an individual management-rights clause that is the source of consternation here but the overall approach of Respondent which leaves the Union without any meaningful method of representing its members in decisions affecting important conditions of employment and thus exposing the employer's bad faith.

In addition the management-rights language allows the Employer to retain the sole and exclusive right to contract or subcontract out work covered under this Agreement to subcontractors or other services providers who are not bargaining unit members. Here too, the Union is required to give up its right to strike and at the same time cede to Respondent the unilateral right to subcontract unit work. Once again, the employees are left in a position where they would be worse off with a contract.

Respondent's proffered rationale for unlimited subcontracting was that the employer should be able to run its facility as it sees fit. The Board has held that such conclusory explanations evidence bad faith. *Liquor Industry Bargaining Group,* 333 NLRB 1219, 1221 (2001); *Mid-Continent Concrete,* 336 NLRB 258, 260 (2001).

d. Economic proposals

While Respondent never made a wage proposal, its limited economic proposals gave it virtually unlimited authority to change the benefits enumerated at will. Initially, Respondent's November 17, 2010 proposals for vacation, holidays, sick leave, health and dental insurance, 401(k) and bereavement leave provided that Respondent could unilaterally change or delete any benefit. After the Union filed the instant unfair labor practice charge, without explanation or without receiving a quid pro quo, on March 3, 2011, Respondent modified some of the economic proposals to provide a fixed benefit amount in the case of sick and bereavement leave, a

reduced amount of vacation and holidays if Medi-Cal reimbursement rates were flat or reduced and the unilateral right to eliminate health and dental insurance and 401(k).

Respondent contends that its initial economic proposal on fringe benefits incorporated the accrual rates and amounts provided for in its employee handbook and in effect, were similar to template language which permitted Alliance employers to establish these benefits by policy, subject only to the requirement that the employer negotiate any reductions in total compensation.

While there is doubt that Respondent was entitled to rely on the template language for its proposals, as will be discussed below, even the template language provided for bargaining and ultimately interest arbitration before changes to wages could be made. While Respondent may have modified its proposals on March 3, 2011, it still retained unfettered rights in many cases to unilaterally change benefits. Yet again, the Union concedes the right to bargain about mandatory subjects of bargaining without a comprehensive grievance/arbitration procedure or in the alternative the right to strike.

Respondent's failure to make a wage proposal is additional evidence of its bad faith. The judge in *Hydrotherm, Inc.,* supra at 1005 noted, where the employer had made no wage proposal despite the union having made two in 3 months, that: "No participant in collective bargaining, on either side of the table, ever expects that a contract can be concluded without agreement on wages and health insurance."

Although for almost 8 months the parties agreed to resolve non-economic issues before going on to economic issues, after the Union made its wage proposal on June 23, 2010, Respondent failed to make a wage proposal to date.

During the period in which the parties bargained, the State of California experienced budgetary difficulties that resulted in late payment of its obligations in 2010 and a reduction in Medi-Cal rates in 2011. There can be no doubt that there was uncertainty for nursing care employers' Medi-Cal funding during the period 2009-2011. However, this condition does not justify the complete absence of some kind of wage proposal from Respondent , even if it were regressive or conditioned upon a certain level or reimbursement rate from the State of California.[43]

As the judge in *Teamsters Local Union* 122, 334 NLRB 1190, 1254 (2001) noted: "Failing to present any economic demands in its initial proposals was unusual. Failing to offer any economics during the succeeding 14 months of negotiations was unconscionable."

e. Union security

In addition, Respondent refused to agree to a traditional union-security clause but proposed an agreement that provided for only a maintenance of membership provision that did not require employees to join the Union or pay an agency fee.

The Respondent is correct in arguing that, just as a union does not violate the Act by aggressively pressing a demand for a union-security clause, so an employer does not violate the Act simply by refusing to agree to such a demand. *Hydrotherm, Inc.,* supra at 150. However, the cases cited by Respondent are inapposite for they involve cases where the only

[43] Respondent in its March 3, 2011 language on benefits proposed just such a formula.

evidence of bad faith was the employer's insistence on no union security or check off. *KFMB Stations,* 349 NLRB 373, 374 (2007); *St. George's Warehouse, Inc.,* 341 NLRB 904, 906-07 (2004); *Phelps Dodge Specialty Copper Products Co.,* 337 NLRB 455, 456-457 (2002); *Challenge-Cook Bros.,* 288 NLRB 387 (1988),

Here, the Respondent's stated reasons for its position, however, revealed a fundamental unwillingness to accept the Union in its proper role as the exclusive representative of its bargaining unit employees. Thus, during bargaining on June 4, 2010, Sable, the Respondent's representative, claimed bargaining unit employees should not have to pay union dues since they did not vote for the Union or because employees had not paid dues in a long time. In particular, it is well established that an employer's refusal to consider a union security clause solely on "philosophical" grounds is evidence of intent not to reach agreement. *Hospitality Motor Inn,* 249 NLRB 1036, 1040 (1980).

3. Respondent's defenses

a. Unclean hands

Respondent contends that since February 2011 when the Union filed the instant charge, the Union has refused to return to the table or offer any counterproposals to Respondent's March 3, 2011 proposals. Respondent argues that the Union cannot now argue with clean hands that Respondent failed to bargain in good faith when the Union itself failed to live up to its bargaining obligations.

The alleged misconduct of a charging party is ordinarily not a defense to an unfair labor practice charge. *Carpenters Local 621*, 169 NLRB 1002, 1003 (1968), enfd. 406 F. 2d 1081 (1st Cir. 1969). However, if proof of misconduct could affect unfair labor practice findings, an affirmatively pleaded defense to that effect must be heard. Thus, bad-faith bargaining by the Union may be raised as a defense to bad-faith bargaining by an employer where a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found. *Times Publishing Co.*, 72 NLRB 676, 683 (1947); *Chicago Tribune Co*., 304 NLRB 259, 259-261 (1991).

However, in circumstances like those here, where an employer is precluding good-faith negotiations by its insistence on unreasonable provisions, the Union should not be compelled to continue the charade for more bargaining sessions before asserting its statutorily protected right by filing an unfair labor practice. *Wright Motors,* supra at 609; *Hydrotherm,* supra *at* 995-996. Here the Union could not have engaged in bad faith where it was futile to bargain. Respondent's affirmative defense is rejected.

b. Template and other collective- bargaining agreements

Respondent based several of its proposals on the so called "template agreement" between SEIU and the Alliance employers. Sable stated that when Respondent acquired Meritcare, a member of the Alliance, in the summer of 2005 he became aware that the Alliance was a collaboration between SEIU and nursing home operators to gain increased state funding in exchange for organizing through card check. Sable obtained a copy of the Alliance agreement[44] which included both the template agreement as well as the Alliance employers'

[44] R. Exh. 53, p.43.

agreement to card check. As noted in its brief, Respondent was enamored of acquiring the economic and management friendly terms of the template. In fact in late 2005, at a time when Respondent refused to recognize the Union at its North Long Beach facility, Respondent and the Union discussed whether the template agreement could be applied at the North Long Beach facility. In the discussions between the Union and Respondent the Union proposed granting Respondent the benefits of the template if Respondent would recognize the Union at North Long Beach and reinstate several North Long Beach employees. The Union later insisted as a condition of applying the template to North Long Beach that Respondent enter into a master agreement covering North Long Beach and three of Respondent's facilities in Northern California. For economic reasons, Respondent chose not to accept the Union's demand and the template was not offered to Respondent.

More importantly the Alliance ceased to exist after 2008 and the Union was no longer extending the template agreement to employers. The obvious predicate for the Union to grant employers the benefits of the template agreement was the employers' concession of the holy grail of card check at its nonunion facilities. Here Respondent was never a member of the Alliance, did nothing to assist in obtaining the benefits of California Assembly Bill 1629 in 2004 and never offered the union card check. In 2005 Respondent was well aware of the Alliance's existence and the reasons the Alliance was created. Like the situation in *Public Service Co. of Oklahoma*, supra*,* the circumstances in which the Union used the template contract with the Alliance employers was different from Respondent's position in the instant bargaining. Knowing the circumstances leading to use of the template with the Alliance employers should have reasonably led Respondent to understand that use of template language in this case was inappropriate to bargaining with the Union.

Respondent argues that the Union continued to use the template agreement as recently as 2011 in negotiations with Anaheim Terrace Care Center.[45] Contrary to Respondent's contention, the Union cited the Anaheim Terrace negotiations as an example of how the Union bargained in negotiations for agreements as successors to the template agreements in early 2011. Valentine stated that in subsequent negotiations when the template contracts had expired, the Union sought to discontinue, remove and replace template language with more traditional contract language. The Union pursued this strategy because the Alliance ceased to exist.[46] Valentine testified that in the final agreed upon Anaheim Terrace contract, template language was removed, including section 2, labor management committee, section 15, economics, section 22, no-strike/no lockout, section 23, grievance procedure, section 25, arbitration procedure, section 28, term of agreement and reopener, and section 30, education and training trust fund. Valentine said that in negotiations with other employers where the template agreement had expired, template language was removed. While some template language may have remained from prior contracts, Respondent's contention that the Union was offering employers template contracts simply does not withstand scrutiny.

In addition to the template language, Respondent contends its proposals were gleaned from other contracts[47] the Union had with similar employers.

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[45] CP Exh. 2.

[46] Tr. pp. 504, LL. 3-25.

[47] Sable testified that he cherry picked Respondent's no-strike/no-lockout proposal from samples other attorneys provided. Unfortunately none of those samples were produced. In the absence of such evidence, I am unable to evaluate whether this language was parallel to that the Union granted other employers.

For example Respondent cited the expired 2001 Candlewood agreement[48] with the Union as an example of parallel language the Respondent utilized in its proposals. An example of the Candlewood contract language Respondent used in its proposals herein was article 10 - No Strike, No Lockout.[49] The Candlewood language gave the employer the right to terminate an employee who violated the provision, however unlike Respondent's own proposal, the Candlewood contract gave the employee recourse to arbitration.

Aside from the issue of whether language from an agreement negotiated over 9 years earlier was still relevant in 2010, it is important to note other differences in the Candlewood agreement with the Union. Article 11 subcontracting[50] provided unlike Respondent's proposal subcontracting only upon first meeting and conferring with the Union. Article 13 grievance procedure,[51] which is traditionally considered in tandem with no-strike no-lockout language, unlike Respondent's proposal, contains no limits on what discipline may be arbitrated. Moreover, unlike Respondent's proposals there is no Employer authority to unilaterally resolve most grievances. Likewise while the Candlewood contract at article 14 - Discharge[52] gave Candlewood the right to discharge an employee who committed certain limited egregious offenses, including patient abuse, insubordination, dishonesty, insobriety, willful negligence, failure to perform work, and incompetence and granted Candlewood the right to adopt house rules that did not conflict with the agreement, under paragraph B of the Candlewood agreement an employee had the right to grieve any discipline to arbitration, unlike Respondent's proposed discharge/discipline/ grievance arbitration language which limited arbitral subjects to terminations or suspensions of greater than 10 days. These are significant distinctions which render a parallel contract language defense inapplicable here.

Respondent points to agreements it made in some contracts with the SEIU-UHW for central/northern California facilities, in which it negotiated provisions to renegotiate wage increases if Medi-Cal rates did not increase sufficiently to fund increases in the contract.[53] While this is true it must be pointed out that at no time did Respondent make such a proposal in this case. In fact Respondent never made a wage proposal of any kind. The only benefits proposals Respondent made either allowed Respondent to unilaterally change or eliminate the benefit without notice, bargaining, or interest arbitration. It can hardly be gainsaid that the benefits language Respondent proposed herein bore any resemblance to the above- provisions that had a mechanism for bargaining mid-term contract changes.

Respondent also looked to an agreement Sable had negotiated with the Union on behalf of another skilled nursing operator in the West Haven Healthcare Center for examples of reasonable proposals on subcontracting. This agreement, to which the Union was a party, gave the employer the absolute right to subcontract "any and all work performed at the facility."[54] Significantly, the same subcontracting provision Sable negotiated also requires the subcontractor to recognize the union as the bargaining representative of the subcontracted employees and to abide by the terms of the West Haven collective-bargaining agreement. Not surprisingly, the second sentence requiring the subcontractor to recognize the union and apply

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[48] R. Exh. 42.
[49] Ibid at 7-8.
[50] Ibid at p 8.
[51] Ibid at p. 10.
[52] Ibid p, 11.
[53] R. Exh. 45, p. 32, 46, pp. 32, 47, pp. 32, 48, pp. 32 and 49, p. 34.
[54] R. Exh. 60, p. 2.

the terms of the collective-bargaining agreement are absent from Respondent's proposals herein.

Respondent contends that its management-rights proposal was similar to the template and to other employer agreements with the Union in Oakland, California.[55] Yet again, Respondent distorts the actual language of its proposals. The contract language in the Oakland agreement did not give Respondent the unilateral right to subcontract unit work without having the subcontractor recognize the Union and apply the terms of the contract nor did it give Respondent the unilateral right to establish rules and regulations.

In sum, I find that the language Respondent proffered in its core contract proposals herein was significantly different from language the Union had agreed to in other negotiations. Moreover, Respondent knew or had reason to know that the template language that was agreed to by the Union in Alliance negotiations as a quid pro quo for card check and other consideration was no longer relevant since the Alliance had ceased to exist by 2008. Accordingly, I reject Respondent's defense that its template based proposals and its proposals based on other contracts were reasonable since the Union had granted them to other employers.

c. Hard bargaining

Respondent suggests that it was only engaging in hard bargaining and that the parties were in the early stages of negotiation with respect to many of the allegedly unreasonable proposals *(*e.g. union security, arbitration) and there was much room to bargain to a mutually acceptable agreement.

Respondent characterizes their initial bargaining proposals as "strong opening gambits" on union security and checkoff, management rights, no strike/no lockout, subcontracting, and successorship, discipline, arbitration and warning notices. Respondent is correct that the Board has found, "it is not unusual at the outset of negotiations for the parties, both union and management, to make demands that they realize, in all likelihood, will not be included in the final agreement . . . more often, the give and take of negotiations govern the final results." *I. Bahcall Industries,* supra at 1261; see also *KLB Industries, 357* NLRB No. 8, 38 (2011). While Respondent cites *Commercial Candy Vending Division,* 294 NLRB 908 (1989), for the proposition that the Board is "reluctant to base a conclusion of good faith or bad faith solely on the content of a party's proposals," there is no such holding in that decision. In *Coastal Electric Cooperative,* 311 NLRB 1126 (1993), the Board merely found that in all of the circumstances the content of the employer's bargaining proposals was not enough to establish surface bargaining where the parties disagreed on only three or four core issues. Here there was virtually no agreement on core issues after a period of 15 months but rather Respondent continued to insist on a plethora of provisions that required the Union to abandon most of its obligation to represent bargaining unit employees such that Respondent could not seriously have expected meaningful collective bargaining. For the reasons noted below, I reject Respondent's contention that it was engaged in hard bargaining.

4. Conclusions

Respondent's discipline and discharge proposal, its grievance/arbitration together with the broad no-strike no-lockout proposal and extensive management-rights language would leave employees worse off than they would be with no contract at all, in precisely the same

[55] R. Exh, 63, p. 2.

manner that evidenced bad faith in *Hydrotherm.* The discipline proposal in *Hydrotherm at 991* defined "just cause" as "any violation of a written rule of the Employer issued pursuant to its management rights . . . or any violation of accepted principles of decency, law, or moral behavior." Here as in *Hydrotherm,* Respondent had the unilateral right to establish any rules which would constitute just cause for termination limiting an arbitrator's discretion. As the Board found in *Hydrotherm, a combination of* such proposals leave the Union powerless to represent employees, and worse off than if the Union had no contract. While the Union would be required to forgo its right to strike as a tool to compel Respondent to concede in disputes concerning mandatory subjects of bargaining, Respondent's discipline and discharge proposal, taken together with its management- rights proposal, would effectively give Windsor "employment at will" power over employees.

The combined effect of Respondent's proposals are similar to the all encompassing proposals made by the employers in *Regency Service Carts,* supra and *Public Service Co. of Oklahoma*, supra.

Here Respondent's extremely broad management-rights clause, like the clause in *Public Service Company of Oklahoma* grants it unfettered discretion in the creation of workplace rules and regulations. The discipline and discharge provision grants Respondent broad discretion in decisions to discipline by establishing cause both in the discipline clause itself and more importantly in any rule Respondent can imagine and unilaterally put into its rules and regulations. In addition the grievance- arbitration language grants Respondent virtually unlimited discretion in any grievance involving a dispute regarding any contract provision short of 10 days suspension by making Respondent the lone decider in those cases. Moreover, the discipline and discharge clause establishes cause for virtually any employee offense, thus severely restricting the discretion of an arbitrator. In contrast to the narrow grievance and arbitration clause, the Respondent's proposed no-strike clause would have broadly prevented the Union and the employees from engaging in or even threatening to engage in "any strike, sympathy strike, boycott, picketing, work stoppage or slow down, sit-down, sit-in, walkout, sick-out, or other retarding of work, refusal to handle merchandise, or other economic interference, pressure or activity of any kind or nature."

Respondent's proposals further granted it unlimited right to subcontract bargaining unit work and granted it the exclusive right to eliminate important benefits including health insurance, retirement and to unilaterally reduce holidays and vacation pay.

Thus, under the Respondent's proposals, employees and the Union would be left with no avenue or very limited means to challenge the Respondent's decisions with regard to layoff, discharge, discipline, health insurance, vacation pay, holidays, retirement, and subcontracting.

Employees have the right under the Act to engage in concerted activities for the purpose of collective bargaining or other mutual air or protection, including the right-to-strike in support of bargaining demands. In collective bargaining it is common for a union to negotiate an agreement that includes a grievance and arbitration clause to enforce the terms and conditions of an agreement in exchange for the right to strike. In the instant case the proposals of Respondent contain the usual restriction on the Union and employees' right to strike in support of its bargaining demands during the contract, but, as a result of the limitations within the contract as described above, gives itself with little practical limitation the right to change employees' terms and conditions of employment.

Taken as a whole, Respondent's proposals establish that it insisted on unilateral control of over virtually all significant terms and conditions of employment of unit employees during the

life of the contract. Taken as a whole, these proposals required the Union to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining. *Whitesell Corp.,* supra*; Public Service Co. of Oklahoma*, supra; H*ydrotherm, Inc.*, supra.

Both here and as the Board found in *Public Service Co. of Oklahoma*, supra at 488:

Indeed, the conclusion is inescapable that the Respondent's proposals, if accepted, would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all. Without a contract, the Union would have retained the statutory right to prior notice and bargaining over changes or modifications in terms and conditions of employment, and it would have retained the right to strike in protest of such actions. The Respondent, however, insisted that the Union relinquish its statutory right to bargain before the Respondent could effectuate changes in working conditions, as well as relinquishing the right to strike. The Union, therefore, could do just as well with no contract at all.

Following the Board's charge to review Respondent's conduct in its entirety to determine if its overall conduct, including its bargaining proposals reflects an intention on its part to avoid reaching an agreement, I find that in offering, maintaining and insisting upon these proposals Respondent insisted as a price for any collective-bargaining agreement that its employees give up their statutory rights to be properly represented by the Union. Respondent's proposals were so comprehensive as to leave the employees and the Union in a situation where they would be better off with no collective- bargaining agreement at all. By this conduct Respondent sought to retain unilateral control over virtually every significant aspect of the employment relationship.

I conclude that this conduct by Respondent is sufficient to sustain a finding of bad-faith bargaining in violation of Section 8(a)(5) and (1) as alleged in the complaint.

## Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its unit employees by insisting in its proposals upon retaining essentially unfettered control over a broad range of mandatory subjects of bargaining, by failing to make wage proposals, and by failing to consider a union-security clause.

4. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith, I recommend that the Respondent be ordered to meet, on request, with the Union and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if agreement is reached, embody such agreement in a signed contract.

Acting General Counsel requests a broad cease-and-desist order and an affirmative order requiring Respondent to commence negotiating in good faith with the Union, honoring all tentative agreements entered into as of February 7, 2011, to agreement, or to impasse, for a period of no less than 1 year and embody any understanding reached in a signed agreement.

In *Hickmott Foods*, 242 NLRB, 1357(1987), the Board stated that a broad cease-and-desist order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." A proclivity to violate the Act is shown where a respondent has a history of similar violations of the Act. *Postal Service,* 339 NLRB 1162, 1163 (2003).

In the instant case Respondent has a history of violating the Act. On September 30, 2007, the Board in *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), *Windsor I,* found that as of July 1, 2004, Respondent, as a perfect Section 8(a)(1), (3) and (5) of the Act by, inter alia, refusing to recognize and bargain with the Union.

While there is history of violations of the Act by Respondent, they are not similar in nature to the violations in this case. *Windsor I* involved successorship issues and a refusal to recognize the Union. There was no allegation of surface bargaining. I cannot conclude that a proclivity to violate the Act has been established in this case and will not recommend a broad cease-and-desist order.

Counsel for the Acting General Counsel also seeks an order directing Respondent to honor all tentative agreements entered into as of February 7, 2011, and bargain with the Union for a period of 1 year, citing *Health Care Services Group Inc.,* 331 NLRB 333 (2000). In *Health Care Services* the respondent withdrew from all tentative agreements reached with the union. In this case there is no evidence that Respondent repudiated any of the tentative agreements reached with the Union. Accordingly there is no reason to order Respondent to honor those agreements.

Finally, in the case of a refusal to bargain with a newly certified union it has been long standing Board practice to ensure that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned, *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962). This case differs from that situation in that the Union herein is not newly certified. There is no certification year, during which the Union's majority status cannot be challenged, which must be preserved.

In addition to the ordinary remedies of a cease-and-desist and bargaining order and notice posting, the Union seeks the additional remedy of reimbursement of the Union's bargaining expenses.

As the Union correctly points out in *Frontier Hotel* & *Casino,* 318 NLRB 857, 859 (1995, the Board held that an award of bargaining expenses is warranted:

In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their ''effects cannot be eliminated by the application of traditional remedies,'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co*., 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

In *Whitesell Corp.,* 357 NLRB No. 97 (2011) the Board applied this standard. In *Whitesell,* as here, the respondent was a successor employer. Unlike this case the employer in Whitesell recognized the union and adopted its predecessor's collective-bargaining agreement. On June 13, 2006, after only 17 days of bargaining the employer declared impasse and implemented its final offer.

After filing a 10(j) petition, on March 13, 2007, the United States District Court ordered respondent to bargain with the union, revoke its implemented final offer and provide information the union had requested concerning the employer's proposals.

On April 4, 2007 bargaining resumed. However, Respondent refused to agree without justification to a recognition clause, engaged in regressive bargaining, and threatened that every proposal it made subsequent to its 2006 final offer would be worse. In addition Whitsell insisted on retaining control over a broad range of mandatory subjects such that its employees would be worse off than if they were without a contract. Whitesell also refused to provide information the union requested about respondent's proposals and refused to schedule further bargaining sessions.

On April 24, 2008, a contempt petition for violation of the March 13, 2007 10(j) order was filed in the District Court. A settlement was reached and bargaining resumed on June 12, 2008. As a result the parties agreed to 11 items, but no significant economic terms.

On October 16, 2008, respondent told the union unless it made substantial movement on core issues, respondent would make a final proposal that was worse than what was on the table. Thereafter respondent made no progress and said its positions were hard and fast and would not change.

On March 27, 2009, respondent declared impasse and on April 1, 2009 implemented its final offer.

On August 26, 2010 the Board in *Whitesell Corp.,* 355 NLRB No. 134 (2010), enfd. 638 F.3d 883 (8th Cir. 2011), found Whitesell had violated Section 8(a)(1) and (5) of the Act for its June 13, 2006, implementation of its final offer.

*Whitesell* was an unusually aggravated case. Not only did Whitesell try to maintain unilateral control over a broad range of mandatory subjects, as here, but also unlike this case, it engaged in regressive bargaining, delayed providing information necessary to bargaining, threatened the Union that if it did not accept its proposals, each subsequent proposal would get worse, and refused to schedule meetings. Whitesell repeatedly demonstrated its recalcitrance by engaging in conduct that had been proscribed by the Board and courts despite orders to the contrary.

I do not find Respondent's conduct infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies. Thus, at this time it is not appropriate to order a make whole remedy for the Union's financial losses it occurred in bargaining with Respondent.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[56]

ORDER

The Respondent, S & F Market Street Health Care LLC, a California limited liability company, d/b/a Windsor Convalescent Center of North Long Beach, California, its successors, and assigns, shall

1. Cease and desist from:

(a) Failing or refusing to bargain in good faith within the meaning of Section 8(a)(5) and (1) of the Act with SEIU, United Long Term Care Workers, Local 6434 (the Union) as the exclusive collective-bargaining representative of the base unit of its employees at its facility in North Long Beach, California:

> All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

(b) Negotiating with a closed mind regarding the terms of a collective-bargaining agreement.

(c) Insisting on contract proposals giving the company essentially unfettered control over a broad range of mandatory subjects of bargaining.

(d) Negotiating without any intent to reach a collective- bargaining agreement with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[56] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Long Beach, California facility, copies of the attached notice marked "Appendix."[57] Copies of the notice, in English and Spanish as provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 16, 2012.

_____
John J. McCarrick
Administrative Law Judge

[57] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by an order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

# APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with SEIU, United Long Term Care Workers, Local 6434 (the Union) as the exclusive collective-bargaining representative of bargaining unit employees:

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

WE WILL NOT negotiate with a closed mind regarding the terms of a collective-bargaining agreement.

WE WILL NOT insist on contract proposals that give the company essentially unfettered control over a broad range of mandatory subjects of bargaining.

WE WILL NOT negotiate without any intent to reach a collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

S & F Market Street Healthcare, LLC d/b/a Windsor Convalescent Center of North Long Beach

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

**THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS**

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
D/B/A WINDSOR CONVALESCENT CENTER
OF NORTH LONG BEACH,
Respondent

and Case: 21-CA-39703

SEIU, UNITED LONG TERM CARE WORKERS,
LOCAL 6434
Charging Party

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